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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 MICHAEL CARROLL,

10 Plaintiff,

11 v.

12 MARY J. LEE, *et al.*,

13 Defendants.

NO. C08-975RSL

ORDER VACATING REPORT AND  
RECOMMENDATION AND  
REFERRING PLAINTIFF'S  
MOTIONS

14 This matter comes before the Court on the Honorable Brian A. Tsuchida's "Report and  
15 Recommendation" regarding plaintiff's civil rights complaint. Dkt. #37. United States  
16 Magistrate Judge Tsuchida recommended that the Department of Corrections ("DOC")  
17 defendants'<sup>1</sup> motion for judgment on the pleadings (Dkt. #16) be granted in part and denied in  
18 part and that the remainder of plaintiff's claims against them be dismissed. He also  
19 recommended that defendant Dansky's motion for summary judgment (Dkt. #23) be granted.

20 Plaintiff has filed objections to the Report and Recommendation. Dkt. #45. Attached as  
21 an exhibit is a document from the King County Superior Court indicating that Magistrate Judge  
22 Tsuchida was involved in plaintiff's original state court case when he was serving as a Public  
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25 <sup>1</sup> These defendants include Mary J. Lee, Brooks Raymond, Dean Mason, Laura Dyer, and Sharon  
Dahlstrom.

Defender. See Dkt. #45, Ex. R. Plaintiff states that he received this document in response to a request on or about December 15, 2008, Dkt. #45 at 20, after Magistrate Judge Tsuchida issued his Report and Recommendation in this case.

Magistrate Judge Tsuchida has no recollection of his involvement in plaintiff's state court case from 16 years ago. Although plaintiff's federal case had been before Magistrate Judge Tsuchida for nearly six months, plaintiff gave no indication at any time preceding his receipt of the King County Superior Court document that he recognized the judge's name from his state court case. Indeed, the single page provided amongst plaintiff's exhibits does not indicate what role Magistrate Judge Tsuchida played in that criminal case; it may be that the sum total of his participation involved representing plaintiff and a host of other criminal defendants on the day of their arraignments. Magistrate Judge Tsuchida's chambers has established several procedures for checking potential conflicts of interests, yet none of them indicated he had any prior relationship with plaintiff.

The Court has every confidence that Magistrate Judge Tsuchida's orders and recommendations in this case have been entirely impartial. Because he has no recollection of plaintiff's state court proceedings, his decisions were not informed by his prior knowledge of plaintiff. However, plaintiff has raised the issue of a potential conflict, Dkt. #45 at 20-21, and the Court finds that plaintiff is entitled to a legal process that is fair and impartial both in fact and in appearance. See Preston v. United States, 923 F.2d 731, 734 (9th Cir.1991) (disqualification of judges and magistrates is appropriate in situations in which there appears to be a conflict of interest, regardless of whether there is any actual bias on the part of the judge).

Therefore, out of an abundance of caution, the Court vacates the Report and Recommendation. In addition, because Magistrate Judge Tsuchida ruled on several motions prior to issuing the Report and Recommendation, the Court will refer those motions to United States Magistrate Judge James P. Donohue for *de novo* consideration. Once the magistrate judge

1 rules on these motions, the Court will consider *de novo* DOC defendants' motion for judgment  
2 on the pleadings, defendant Dansky's motion for summary judgment, and DOC defendants'  
3 motion for summary judgment.

4 The Report and Recommendation (Dkt. #37) is hereby VACATED. The Court hereby  
5 refers to United States Magistrate Judge James P. Donohue, pursuant to 28 U.S.C. § 636(b)(1),  
6 Local Rule MJR 3, and Fed. R. Civ. P. 72(a), plaintiff's "Motion for Enlargement of Time for  
7 Discovery/Modification of Scheduling Order" (Dkt. #19), plaintiff's "Motion for Appointment  
8 of Counsel" (Dkt. #28), and plaintiff's request to issue a subpoena in a civil case (Dkt. #29).<sup>2</sup>  
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10 DATED this 10<sup>th</sup> day of April, 2009.  
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16 Robert S. Lasnik  
17 United States District Judge  
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24 <sup>2</sup> Magistrate Judge Tsuchida's order granting plaintiff's application to proceed *in forma pauperis*  
25 (Dkt. #3) is not similarly implicated by the potential conflict of interest and is therefore not affected by  
26 this Order.